

VU Research Portal

The Changing Function of Matrimonial Property Agreements in the Netherlands

Flos, A.G.F.M.

published in

Family relations in a changing world ()
2014

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Flos, A. G. F. M. (2014). The Changing Function of Matrimonial Property Agreements in the Netherlands. In V. Todorova, G. Grigorov, & A. Shopov (Eds.), *Family relations in a changing world* () (pp. 219-229). Sibi.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

THE CHANGING FUNCTION OF MATRIMONIAL PROPERTY AGREEMENTS IN THE NETHERLANDS

*Alexander Flos**

1. Introduction

In most jurisdictions, (future) spouses have the option of departing from a statutory matrimonial property regime by concluding a matrimonial property agreement. The Netherlands is no exception in this respect: Dutch (future) spouses are allowed to choose one of a variety of contractual regimes or to design their own. In this article I will give an explanatory overview of the developments in the field of matrimonial property agreements over the last hundred and fifty years. I will, therefore, discuss the developments in the legislation governing matrimonial property agreements in conjunction with the doctrinal developments and the practice of the use of various forms of matrimonial property agreements. Three periods will be identified in this development process: the first period (until 1957) will be described in paragraph two, the second (1957–2002) in paragraph three and the third – current period (from 2002 onward) in paragraph four.

2. Matrimonial Property Agreements until 1957: Empowering Legally Incapable Married Women

The Old Dutch Civil Code¹ was enacted in 1838, replacing the French *Code Civil* which came into force in 1811 when the Netherlands was annexed by Napoleon's Empire². Although the Dutch Civil Code has its own particularities, in regard to matrimonial property law it resembles the French *Code Civil* in many respects. The starting point of both codes was the general principle that the husband is the head of the family (Article 160 Old Civil Code) and the wife is legally incapable and has to obey her husband.

* Lecturer/researcher at the VU University, Amsterdam. The author would like to thank Prof. M. V. Antokolskaia and B. Breederveld for their valuable comments on a draft version of this article. Any errors in the article are the responsibility of the author.

¹ Het Burgerlijk Wetboek ('BW').

² De Blécourt, A. S. Kort begrip van het oud-vaderlands burgerlijk recht. Groningen, 1950, p. 44.

The default statutory matrimonial property regime was, and still is, the universal community of property. This community of property includes *all* the assets of both spouses. All assets acquired both before, and during, marriage fall into this community of property. The way that the assets were acquired is irrelevant; assets acquired as gifts and inheritances, in general, also form part of the community of property. However there were two statutory exceptions to this rule. It was possible for a donator to stipulate by notarial deed that the gift should be excluded from the community and treated as the separate property of the recipient. The same applied to inheritance: the testator could stipulate that the inherited property should not become part of the community of property but the separate property of the heir. In addition to these two statutory exceptions, a third exception was developed by the courts, according to which, the assets of a highly personal nature remained the separate property of the spouse who used them. Consequently, as well as the community property, each of the spouses could have his or her own separate property.

A married woman was legally incapable and the community property was administered by the husband (Article 179 Old Civil Code). He could dispose of said community property at his own discretion without the consent of his wife. The only restriction was the prohibition against donating community property (Article 179 Old Civil Code). A married woman could only perform legal acts with the consent of her husband, and her movable separate property, including income from employment, was in principle, administered by the husband³; in contrast, the administration of the separate real property of the wife required her consent. Thus, within the statutory regime of universal community of property, a married woman had no control over community property or her separate movable property, and only had limited control over her separate immovable property. The only way for a married woman to acquire more control was to enter into a matrimonial property agreement.

The Old Dutch Civil Code, based on the principle of the freedom of contract, permitted future spouses to depart from the community of property by entering into a matrimonial property agreement. A matrimonial property agreement could only be concluded prior to the marriage; concluding a matrimonial property agreement during marriage was not allowed in order to avoid the undue influence of one spouse on the other. A matrimonial property agreement had to be concluded in the

³ Land, N. K. F., C. W. Star. Busmann, Verklaring van het Burgerlijk Wetboek. Deel I. Haarlem 1914, 218–219.

form of a notarial deed. The main reason for this requirement was to provide legal certainty about the content of the matrimonial property agreement, for spouses themselves and any third parties (e. g. creditors). The task of the civil-law notary was to ensure that the content and the procedure of entering into the agreement adhered to the rules of law.

The Dutch Civil Code contained several statutory models of regimes that could be chosen in a matrimonial property agreement. The first two were limited communities of property. One was the community of gains and losses⁴. This regime entailed having a community of property which consisted of the gains acquired during marriage and meant that both spouses would be jointly and separately liable for any losses which were sustained during the marriage. The other statutory community of property was the community of fruits and incomes⁵ which consisted of a limited community of fruits and income. Both statutory limited communities of property were never very popular.

The most commonly used form of the contractual regime of matrimonial property was one which stipulated the total separation of property and excluded any form of community⁶. This contractual regime excluded any kind of contractual claims between spouses both during and after the marriage and owed its popularity to its ability to grant a wife control over her property. In the first place, this regime allowed a wife to retain all her property as separate property. In the second place, whilst entering into a matrimonial property agreement, the spouses could still stipulate that the wife could administer her own property, including her income (Article 195 OCC). Moreover, the wife could be granted a general power of attorney to perform legal acts concerning the administration of her separate property. As matrimonial property agreements could not be altered, a general power of attorney of this nature, once granted could not be revoked by the husband⁷. In this way a married woman could, in fact, become legally capable, albeit that this was limited to legal acts concerning the administration of her own property, and only then because her husband had given his consent for this purpose⁸. Thus the main function of matrimonial property agreements

⁴ De gemeenschap van winst en verlies.

⁵ De gemeenschap van vruchten en inkomsten.

⁶ De Koude Uitsluiting.

⁷ Land, N. K. F., C. W. Star. Op. cit., p. 163.

⁸ Opzoomer, C. W. Het Burgerlijk Wetboek verklaard door C. W. Opzoomer. Amsterdam, 1874, p. 233; Diephuis, G. Het Nederlandsch Burgerlijk Regt. Groningen, 1886, p. 186.

before 1957 was giving legally incapable wives the possibility of retaining control over their property during the marriage.

3. Period from 1957 to 2002

In 1957 married women were granted full legal capacity and became entitled to perform legal acts without their husband's consent. And, although the Old Civil Code retained the provision that placed the husband at the head of the family, it did remove the provision that required married women to obey their husbands.

Granting married women legal capacity required changes to be made in the rules governing the administration of property under the statutory regime. There was, however, a strong sentiment that the spouses should not administer the community together; there 'could be no two captains on one ship'. The main reform entailed granting the wife the power to administer her separate property, including her income⁹. The authority to administer community assets depended upon who had brought the asset in question into the community. For example, if a car had belonged to the wife prior to the marriage, and then through the marriage became part of the community of property, the power of administration would belong to the wife. Before 1970 spouses could depart from this provision by making a simple agreement. After 1970 they could still avoid it, but only by making a matrimonial property agreement. In 1970 the new Dutch Civil Code on family law was enacted but introduced no major changes in matrimonial property agreements.

Several specific assets – the family dwelling, household goods – were deemed so important for the family, that it was only possible to dispose of them with the consent of the other spouse (Art. 164a OCC). This rule was applicable, irrespective of whether the specific asset in question was the private property of one of the spouses, or belonged to the community of property. The other spouse's consent was also required for the making of extraordinary gifts, or for granting personal security for the debt of the other person, other than in the framework of business or professional activities.

The most notable change in the field of matrimonial property agreements introduced in 1957 was the possibility of concluding a matrimonial property agreement during the marriage. This also meant that

⁹ **Nuytinck, A. J. M.** *Bevoegdheid van echtgenoten in het huwelijksvermogensrecht*. Deventer, 1987, 35–36.

a contractual property regime agreed before the marriage could be subsequently altered and that the Dutch matrimonial property system became more flexible.

Another important innovation was the development of a new contractual regime of matrimonial property. The change in the administration under the statutory regime of matrimonial property made it no longer necessary to opt for a contractual regime of total separation of property in order to give the wife power to administer her own property. The new challenge for Dutch matrimonial property law was to develop a contractual regime which was better at protecting the interests of the wife than the total separation of property and yet, at the same time, offered enough protection of the autonomy of the spouses. The main problem with total separation was that in traditional marriage – still the most common type of marriage in the Netherlands at that time – the husband was the breadwinner and the wife mother and housewife. In such a marriage the total separation of property means that a wife acquires no property or financial compensation for childrearing and housekeeping. With the increase in divorce in the 1960s more and more married women were confronted with the unreasonable consequences of total separation.

In 1959 – just after the amendments of the law in 1957 – the civil-law notary Van der Ploeg wrote an influential article that changed the Dutch contractual property regime landscape¹⁰. In this article about England and the Royal Commission on Marriage and Divorce Report of 1951–1955 he criticized the regime of the total separation of property and supported the Royal Commission's conclusion that total separation does not sufficiently safeguard the wife's position and “when the marriage breaks down (that) the wife who has always given all her energy to her work in the home may have to face the situation that she has nothing she can call her own; even money she has saved over the years from the housekeeping allowance belongs in law to her husband. We recognize that real hardship may occur in this type of case”¹¹.

To mitigate these disadvantages, Van der Ploeg advocated a new contractual matrimonial property regime called the ‘New Amsterdam

¹⁰ **Van der Ploeg, P. W.** De positie van de vrouw in het regime van de uitsluiting van elke gemeenschap van goederen. Weekblad voor Privaatrecht, Notariaat en Registratie, 1959 (4585), 241–243; 1959 (4586), 253–255.

¹¹ Report of the Royal Commission, London 1956, as cited in the article by **Van der Ploeg, P. W.** Op. cit., p. 241.

model'¹². This new regime intended to strengthen the position of married women and eliminate the disadvantages caused by the limited community of property. This contractual regime entailed a complete separation of property, and contained an obligation to periodically divide any acquired gains (annually for example) or to divide them when the marriage is terminated or the regime is altered. These gains include all the revenue from income, and the profits and interest after the deduction of all expenses. If spouses cannot prove ownership of an asset, there is a presumption that it belongs to both of them in equal parts¹³. While this final division of property closely resembles the contractual regime of the deferred community of property which exists in many West-European countries, the periodical division of gains only exists in the Dutch legal system¹⁴.

The New Amsterdam model tries to combine the best of both worlds: it separates the property providing protection from the other spouse's creditors, on the one hand, and it enables a wife to share in any increase in the wealth of her husband which has accumulated during the marriage, on the other hand. Following the rapid increase in the divorce rate after the introduction of no-fault divorce in 1971, the New Amsterdam model became so popular that it eclipsed the total separation of property regime. The following figures illustrate this spectacular growth. In 1971 61.9 % of all the couples entering into matrimonial property agreements opted for total separation of property; in 1980 only 27.32 % of the couples made this choice. The popularity of the total separation of property regime continued to drop further to 20.11 % in 1990 and to 6.3 % in 2003. Meanwhile the New Amsterdam model became more and more popular. In 1970 only 14.5 % of couples had opted for the New Amsterdam model¹⁵, but, by 1975, it was already at 34.8 %, and by 1980 it was 62.4 % and in 1985 70.0 %¹⁶. From that point on the figures stayed at more or less the same level: 1990 – 66.0 %, 1995 – 73.5 % and 2000 – 71.5 %.

¹² Het nieuwe Amsterdamse model.

¹³ **Van der Ploeg, P. W.** Op. cit., p. 255.

¹⁴ According to Zonnenberg, who analyzed the legal systems of France, Belgium, Luxembourg, Spain, Portugal, Italy, the Nordic countries, England, Germany and Switzerland: **Zonnenberg, L. H. M.** Het verrekenbeding. Deventer, 2009, p. 38.

¹⁵ **Van Mourik, M. A. J.** De ontwikkelingen in de praktijk der huwelijkse voorwaarden. Weekblad voor Privaatrecht, Notariaat en Registratie, 1996, (6302).

¹⁶ **Van Mourik, M. A. J.** Ibid.

These figures clearly indicate that the rise in divorce went hand in hand with the increased use of the New Amsterdam model. The increase in divorce meant that spouses were becoming more and more aware of the possibility that their marriage would end as the result of a divorce, and that in such a case a choice for total separation of property would leave the wife empty-handed. Therefore – partly due to the recommendations of civil-law notaries – more spouses started to opt for the New Amsterdam model with the periodical division of property rather than a total separation of property.

4. Recent developments and the codification of netting covenants

Although the separation of property regime and its periodical division of gains appeared, in the beginning, to be a good middle ground between the total separation of property and the universal community of property. In the long run it frequently led to litigation between spouses.

One of the reasons for this was that, until 1997, it had been customary for civil-law notaries to include a clause in matrimonial property agreements with a periodical division which stipulated that the spouses had to divide the gains every year. If this obligation was not met after a certain time period both parties would lose the right to appeal to this clause. But in practice, it became clear that most of the couples simply forgot to periodically divide their (yearly) gains¹⁷ and when they applied for a divorce and turned to a lawyer they discovered that their matrimonial property regimes had de facto turned into the total separation of property, because they could no longer appeal to this clause. As this never was the intention of the spouses, the Dutch judges were reluctant to apply this clause of periodical division during the divorce proceedings, and often declared that any appeal to this clause was not applicable during divorce as it was contrary to reasonableness and fairness.

Another problem arising from the non-execution of the obligation to periodically divide gains was how to assess the exact amount to be divided when the marriage was terminated or altered. An average married couple, for example, does not keep accurate records of their annual gains. Eventually the Supreme Court decided that spouses had to

¹⁷ Something that had already been foreseen by Van der Ploeg, but he underestimated the legal problems brought along with it.

divide their gains, including investments, and the reinvestment of what should have been divided and the benefits thereof, *de facto* creating a final division. This rule is now codified (Book 1, Article 141, paragraph 1 Civil Code).

Also the legal lack of clarity regarding the non-execution of the obligation to periodically divide gains, led to more litigation. In order to tackle this problem, in 2002, the law was changed and the already existing case law was codified into the provision that if spouses failed to perform periodical division of gains, then any property present when their marriage is dissolved is presumed to consist of what should have been divided (Book 1, Article 141, paragraph 3 Civil Code). However, the division of property upon the dissolution of marriage is still problematic, with several legal questions unanswered¹⁸. Legal scholars are, therefore, critical about the practical use of the periodical division clause¹⁹.

In recent years there has been a revival in the popularity of a total separation of property and a decrease in the popularity of a separation of property with a periodical division of gains. The latest study of matrimonial property agreements during 2004–2009, performed by the University of Nijmegen, revealed that, over the last few years, spouses have increasingly opted for a total separation of property²⁰. From 2004 to 2009, the percentage of couples who opted for a total separation of property, increased from 24.5 to 34.3²¹. In the same period the popular-

¹⁸ **De Bruijn, A. R., W. H. Huijgen, B. E. Reinhartz.** *Het Nederlandse huwelijksvermogensrecht*. Deventer, 2012, for an overview of the legal issues arising out of the periodical division clause.

¹⁹ **Kraan, C. A., Q. J. Marck.** *Het huwelijksvermogensrecht*. Den Haag, 2012, 253–254. **Schols, F. W. J. M.** *Er was eens... een huwelijksvermogensrechtelijke wolf in schaapskleren*. *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2010 (6860), 758–759. **Verstappen, L. C. A.** *De Wet regels verrekenbedingen in de praktijk*. *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2004 (6584), 521–532.

²⁰ It should, however, be mentioned that the researchers used a broad definition of the total separation of property, attributing to total separation all those contractual regimes which had led to almost the same result (e. g. limited community of property with community funds including only household goods or separation of property with division of gains only in case of the death of one of the spouses): as seen in paragraph 3, the percentage of total separation of property was 6.3 in 2003, according to prior research.

²¹ **Schols, F. W. J. M., F. M. H. Hoens.** *CNR-huwelijksvoorwaardenonderzoek, deel I: algemene en koude voorwaarden. De ontwikkelingen in de praktijk der huwelijks- en partnerschapsvoorwaarden in de periode 2004–2009. Resultaten van een voortgezet landelijk onderzoek*. *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2012 (6956), 943–953.

ity of having the separation of property regime with its periodical division of gains was losing ground to the separation of property with a final division of property. In 2004 44.4 % of spouses choosing the separation of property regime which had the division of gains opted for periodical division and 60.8 % for final division²². In 2009 this proportion became 24.3.2 % for periodical division and 60.2 % for final division²³.

One explanation for these changes might be the growing reluctance of civil-law notaries to advise spouses to opt for a periodical division of gains, as this regime came to be associated with uncertainty and litigation. Another possible explanation might be the advancement of the emancipation of women and the growing number of families which had an equal division of breadwinning activities. In 2001 54.4 % of women between the ages of 15 to 65, were in gainful employment. By 2013 it was already 66.0 %^{24, 25}. Working women might feel less need of the protection offered in a matrimonial property regime and therefore opt for a total separation of property. However, in spite of these changes, the economic inequality between husbands and wives persisted. Seventy-three percent of Dutch working women have a part-time job²⁶ and women, especially women with children, work fewer hours compared to the women without children²⁷. Typically women

²² There are matrimonial property agreements that contain both periodical and final set-off clauses, so there is some overlap.

²³ **Schols, F. W. J. M., F. M. H. Hoens.** CNR-Huwelijksvoorwaardenonderzoek, deel II: verrekenbedingen en bijzondere facetten. De ontwikkeling in de praktijk der huwelijks- en partnerschapsvoorwaarden in de periode 2004–2009. Resultaten van een voortgezet landelijk onderzoek. Weekblad voor Privaatrecht, Notariaat en Registratie, 2014 (7002), 33–44.

²⁴ These figures are based on the Central Agency for Statistics, het Centraal Bureau voor de Statistiek: <http://bit.ly/1j8T9gK>. The full URL: <http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLNL&PA=71738NED&D1=24-25&D2=a&D3=0&D4=0&D5=6,11,16,21,26,31,36,41,46,51,60,1&HD=130311-0948&HDR=G1,T&STB=G2,G3,G4>.

²⁵ The participation of men in 2001 was 66.5 % and 72.7 % in 2013.

²⁶ Based upon the study “Emancipatiemonitor 2012” conducted by the Central Agency for Statistics, het Centraal Bureau voor de Statistiek, and the Netherlands Institute for Social Research, het Sociaal en Cultureel Planbureau, p. 59: <http://bit.ly/1hWFsUO>. The full URL: <http://www.cbs.nl/nl-NL/menu/themas/dossiers/vrouwen-en-mannen/publicaties/publicaties/archief/2012/emancipatiemonitor-2012-pub.htm>.

²⁷ See the study conducted by the Central Agency for Statistics, het Centraal Bureau voor de Statistiek: <http://bit.ly/1hvf5VI>. The full URL: <http://www.cbs.nl/NR/rdonlyres/50690B1C-77C1-4946-8B2C-C71C88CD0394/0/ebb2012microdata.pdf>.

work full time when they marry but reduce their working activities when children arrive. In cases like these the total separation of property is very unfavourable for them.

In 2008, during the passage of the bill amending matrimonial property law, several MPs suggested that the total separation of property should not be allowed as it did not provide adequate protection of the interests of women with children. In order to deal with this suggestion the Minister of Justice commissioned research on the negative effects of the contractual regime of the total separation of property. The study, published in 2011, revealed that this regime generally causes financial disadvantage for divorced women with minor children and that a certain – albeit relatively small – group of these women faced severe financial disadvantages as a result of a total separation of property. The same study put forward several suggestions for mitigating the negative effects of total separation e. g. independent legal advice for future spouses contemplating a total separation of property, special status for the matrimonial home and the possibility of a judge setting aside or altering a matrimonial property agreement if putting it into effect would lead to great hardship for the spouse with minor children²⁸. The State Secretary of Justice, however, did not find sufficient grounds for amending the law governing the total separation of property²⁹.

Conclusion

This brief sketch shows that the evolution of the use of matrimonial property agreements in the Netherlands was closely linked to the development of a statutory regime of matrimonial property and the evolution of Dutch society. Before 1957 the most popular contractual regime was the total separation of property because it allowed the property of the wife to be safeguarded and enabled the legally incapable wife to control her own property. From the 1970s this regime was eclipsed by the New Amsterdam model which stipulated a periodical division of income, allowing a spouse (e. g. the housewife) without income and property to be protected against the creditors of the other

²⁸ **Antokolskaia, M. V. et al.** Koude Uitsluiting: materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan, Den Haag, 2011.

²⁹ Parliamentary document of the Lower House of the States General: Kamerstukken II, 2011–2012, 28867, nr. 29 (Brief van de staatssecretaris van veiligheid en justitie), p. 2.

spouse by safeguarding her interests. In recent years, the emancipation of women has led to a revival in the popularity of agreements in which there is a total separation of property. The principle of the freedom of contract is still one of the leading principles in Dutch law governing matrimonial property agreements. However, there is still a (growing) concern in Dutch society about how to combine the freedom of contract with the protection of the economically weaker spouse and the children of the marriage.

ПРОМЕНЯЩАТА СЕ ФУНКЦИЯ НА БРАЧНИТЕ ДОГОВОРИ В ХОЛАНДИЯ

*Александер Флос**

Резюме

В статията се прави преглед на развитието на уредбата на брачните договори през последните сто и петдесет години. Основна функция на брачния договор преди 1957 г. е да гарантира на недееспособната съпруга правото да запази контрол върху своето имущество по време на брака. През 1957 г. на омъжените жени се предоставя пълна дееспособност и те вече могат да извършват правни действия без съгласието на своите съпрузи. С увеличаващия се ръст на разводите от 1970 г. насам съпрузите все повече осъзнават възможността бракът им да приключи с развод и при избран режим на пълна имуществена разделност съпругата да не получи нищо. Поради тази причина брачните партньори започват все по-често да избират режим на договорна общност с периодично разпределяне на имуществата (New Amsterdam model) за сметка на режима на пълна разделност.

През последните години пълната имуществена разделност отново добива популярност поради еманципацията на жените. Също така намалява популярността на имуществената разделност с периодично разпределяне на печалбите в сравнение с режима на разделност с уговорка за окончателното им разпределяне, което се обяснява със стремежа на страните да постигнат по-голяма сигурност и да бъдат избегнати съдебни спорове помежду им.

* Лектор/изследовател в Свободния университет – Амстердам.